substituting regulation for the operation of market forces.[62] Any broader sanction of state regulatory authority over providers of commercial mobile services would also confer an unfair advantage on "private" carriers that offer functionally equivalent services but that will remain classified as private -- and thus beyond the reach of any state regulation -- until 1996.[63]

Consistent with this intent, the Commission should sanction state efforts to regulate market entry or the rates for service only to the minimum extent necessary to remedy a market breakdown and protect consumers. As a threshold matter, the Commission should grant a state petition only if the state can meet the burden of demonstrating through empirical evidence presented in its initial petition that market conditions vary significantly from national norms. In addition, because the statute predicates the granting of a state petition on the need for consumer and competitive safeguards, the state petitioner should be required to present concrete evidence of anticompetitive behavior and

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[62] 47 U.S.C. § 332(c)(3). See also House Report at 261 (in reviewing petitions filed by the states, "the Commission also should be mindful of the Committee's desire to give the policies embodies [sic] in the Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee"). In this regard, the Commission should confirm the plain intent of Section 332(c) and preempt state regulation concerning all services offered by a commercial mobile service provider, including enhanced services as well as basic communications services.

[63] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(c)(2)(B), 107 Stat. 312, 396 (permitting private carriers to remain classified as private for three years after the date of enactment).

consumer harm.[64] A petitioning state should also offer proof that ad hoc state regulation is a better means of protecting consumers than a uniform Federal policy. If the state fails to satisfy its burden of proof, the petition should be dismissed without further proceedings.

Even if some state regulation of rates is justified, moreover, the Commission has broad authority to condition that regulation so that it does not undermine the overall intent of the statute.[65] Congress clearly intended that the Commission would exercise that authority to the fullest extent:[66]

> [T]he Commission, in considering the scope, duration or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this subsection as implemented by the Commission, so that, consistent with the public interest, similar services are accorded similar regulatory treatment.[67]

In particular, a state should be permitted to regulate comparable mobile services differently only to the extent the Commission has likewise established separate regulatory classifications of commercial mobile service providers. Congressional intent on this point is explicit.[68] Where the Commission has determined that dissimilar regulation of mobile service providers is inconsistent with the growth and nationwide development of a

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[64] In this regard, it is significant that "few states have seen the need to regulate cellular rates." Notice at ¶ 63.

[65] 47 U.S.C. §§ 332(c)(3)(A), (B).

[66] See 47 U.S.C. § 332(D)(3); Conference Report at 494.

[67] Conference Report at 494.

[68] See id.

competitive market for commercial mobile services, a state should not be permitted to establish such dissimilar regulation under color of Section 332(c)(3). Such a result would effectively substitute a patchwork of state-imposed regulatory classifications for the uniform Federal regulatory framework adopted by Congress, thereby undermining fair competition and the growth and development of commercial mobile services.

The Commission should also impose a "sunset" condition on state entry and rate regulatory authority to ensure that the state's regulatory requirements do not remain in effect long after they cease to be justified.[69] Likewise, any grant of a state rate regulation petition should provide for repeal upon the occurrence of a particular event, such as the entry of a new provider into the market or the loss of market share of providers subject to state authority. Obsolete state regulations should not be allowed to produce distortions in a competitive market because of delays in removing the regulations.

As a procedural matter, the Commission should establish a requirement that only a state agency responsible for telecommunications matters may file a petition to exercise rate or entry regulatory authority and only the state or a regulated entity may seek termination of that authority. The Commission has in other contexts limited the class of entities that may

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[69] See 47 U.S.C. § 332(D)(3) (empowering the Commission to grant state petitions "for such periods of time" as are necessary to ensure that rates are not unjustly or unreasonably discriminatory).

activate the Commission's decision-making process to those entities that have a direct interest in its outcome.[70] Permitting other entities to file a petition would permit a regulated entity's unregulated competitor to utilize the petition process for competitive advantage rather than to redress competitive or consumer harm.[71] If state regulation is truly warranted, that competitor should have little difficulty in persuading the appropriate state regulatory authority to request rate and entry regulatory authority from the Commission.

While the statute also permits limited "grandfathering" of existing commercial mobile services rate and entry regulation, the Commission should ensure that requests to continue existing regulation will not hamper the development of mobile services. Indeed, because the statute requires states that seek to continue exercising existing authority to "satisf[y] the showing required under subparagraph (A)(2) or (A)(ii) [for state petitions],"[72] state requests should be subject to the same evidentiary

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[70] See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, 8 FCC Rcd. 2965, 2977 (1993) (permitting only cable systems and broadcast stations to request modification of a television market for must carry purposes).

[71] McCaw has experienced first-hand how private carriers can misuse the regulatory process for competitive advantage. In 1992, United Parcel Service ("UPS") selected four cellular carriers, including McCaw, to provide a nationwide automated package tracking system. RAM Mobile Data USA, L.P. ("RAM"), a private carrier exempt from state regulation, also bid for the UPS project. When its bid was rejected, RAM attempted to delay the cellular carriers' introduction of the service by filing petitions in opposition in three states.

[72] 47 U.S.C. § 332(B).

standards -- requiring, inter alia, proof of market failure and consumer harm -- as apply to petitions for new state regulatory authority.

Finally, while the states are generally permitted to regulate the "terms and conditions" of commercial mobile service, this authority should be construed narrowly to ensure that it does not provide a "backdoor" for states to regulate rates or entry. Such a result would be fundamentally inconsistent with the Congress's goal of creating a uniform regulatory framework -- at the Federal level -- for commercial mobile services that minimized regulation of the providers of such services. Thus, state efforts to require annual reports, financial information, or "informational tariffs" from carriers they do not regulate should be precluded by the Commission.[73] Likewise, the Commission should make clear that regulatory principles applicable to commercial mobile service providers through Section 332(c)(1), such as non-discrimination or the reasonableness of rates, are solely within the purview of the Federal regulators;

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[73] While Congress apparently contemplated that a state could review an application for transfer of control of a commercial mobile service provider, see House Report at 261, this was not intended to authorize the state to engage in a wide-ranging inquiry that could restrict or preclude entry by the transferee. Such a result would be inconsistent with the statutory preemption of state entry regulation with respect to commercial mobile services. Rather, a state's review of a transfer application would be limited to ensuring continuity in the day-to-day operations of the service provider. Cf. id. (defining "terms and conditions" to include "consumer protection matters").

they are not "terms and conditions" to be implemented by the states.

IV. Paging and Other Store-and-Forward Services Should Be Classified as Commercial Mobile Services

A. All Paging Service Providers Should Be Regulated Equally Since Private and Common Carrier Paging Licensees Offer Similar Services

Consistent with the goal of regulatory parity, the Commission should apply the same regulatory requirements to common carrier and private carrier paging services. Private carrier paging ("PCP") licensees offer paging services on a commercial basis to government agencies, public safety organizations, and businesses. Now that the Commission has authorized PCP licensees to extend their services to individual customers for non-business purposes[74] and to obtain geographic exclusivity,[75] every technical distinction between PCPs and common carrier paging licensees is gone.[76] Because PCPs and common carrier paging licensees may now compete on equal footing,

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[74] Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals, 8 FCC Rcd. 4822 (1993) (Report and Order).

[75] See Public Notice, Channel Exclusivity to be Provided to Qualified Private Paging Systems at 929-930 MHz, PR Docket 93-35, Report No. DC-2519 (Oct. 21, 1993).

[76] Even while these technical distinctions were in place, PCP and common carrier services were indistinguishable from the perspective of the customer and competed head-to-head.

there is no justification for imposing dissimilar regulatory requirements.[77]

B. Services Provided by Paging Systems Should Be Classified as Commercial Mobile Services

Because PCP services satisfy the elements of the "commercial mobile services" definition, they should be subject to the same regulatory requirements as are other commercial mobile service providers. As an initial matter, paging services, especially services currently offered by private carrier paging licensees operating under Part 90 of the Commission's rules, provide service on a "for-profit" basis.

Moreover, PCPs generally also offer interconnected service. While the Notice suggests that paging, licensee-operated store-and-forward, and computer relay services should be deemed private mobile services because there is no "real-time" interconnection,[78] the interconnection requirement element should be deemed satisfied whenever either party can initiate and

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[77] Even seemingly minor regulatory disparities can produce significant marketplace distortions. Under the Commission's current rules, for instance, a PCP may obtain temporary authority during the pendency of an application to construct new facilities, 47 C.F.R. § 90.159, while a common carrier licensee must wait until its application is approved before commencing operations. Id. § 22.43. This time difference, which can range from to six to nine months, permits PCPs to solicit prospective customers with the promise of almost immediate initiation of service. This, in turn, gives PCPs a significant competitive advantage over their common carrier competitors based solely on regulatory disparity.

[78] The Commission stated that whether or not private paging services are classified as commercial mobile services, will depend upon whether they provide interconnected service. Notice at ¶ 39.

receive calls through a physical interconnection with the public switched network.

Indeed, the Commission acknowledges that a caller has no more control over the transmission of store-and-forward or relay paging messages as a caller trying to send a message through a licensee-operated answering service.[79] In both situations, the completion of the communication depends on the intervention of the service provider and physical interconnection with the public switched network. The statute establishes interconnection as a fundamental prerequisite to classification as a "commercial mobile service"; the type of interconnection is not the determining factor.[80] Otherwise, classification of paging service providers based on the type of interconnection provided would subject providers of comparable services to disparate regulatory requirements.

Finally, paging services are effectively available to the public. Paging service providers operating under Part 22 of the Commission's rules, like McCaw, are providing service to the public. The services of PCP licensees are also available to the public. PCP licensees can offer service not only to state and local government agencies, public safety organizations, but also

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[79] Id. at ¶ 21 n.25.

[80] The Commission indicated that the definition of "interconnected service" for paging purposes should depend on the particular type of store-and-forward technology that is used. Notice at ¶ 21.

to businesses and individuals as well.[81] Therefore, absent eligibility restrictions that substantially limit the availability of PCP service, the Commission should define such services as "commercial mobile service" for purposes of the statute.

V. Interconnection Policies Should Promote the Development of a Seamless National Telecommunications Infrastructure

While Congress authorized the Commission to impose interconnection obligations on common carriers, it did not, as the Notice acknowledges, require the Commission to alter its current interconnection policies.[82] The Commission should therefore impose new requirements or remove existing ones only to the extent warranted by prevailing market conditions.

Because the local exchange carriers ("LECs") continue to possess monopoly control over the local exchange bottleneck, the Commission should not reduce the LECs' current obligation to provide physical interconnection to commercial mobile service providers.[83] By contrast, there is no policy or statutory justification for imposing interconnection requirements on providers of commercial mobile service.

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[81] Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals, 8 FCC Rcd. 4822 (1993) (Report and Order).

[82] See Notice at ¶ 69 (citing Section 332(c)(1)(B)).

[83] See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd. 2910, 2912, 2915 (1987) (requiring, inter alia, the LECs to negotiate interconnection arrangements in good faith and to develop cost-based interconnection charges).

The basis for requiring local exchange carriers ("LECs") to provide interconnection to mobile services licensees, interexchange carriers, and competitive access providers is the continued bottleneck control that the LECs exercise over the local exchange network. Unlike the LECs, providers of commercial mobile services enjoy neither monopoly control over essential facilities nor the market dominance that would give them the incentive and ability to create substantial barriers to entry. New entrants into the mobile services marketplace have demonstrated time and again that it is not necessary to interconnect with an existing mobile services network in order to offer service; rather, new entrants have constructed their own networks and tied them into the public switched network by interconnecting with the local telephone company.[84/]

In the interests of a uniform Federal policy for commercial mobile services,[85/] the Commission should preempt the states from imposing interconnection requirements on commercial mobile service providers. As Congress recognized, mobile services, "by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure . . . ."[86/] Interconnection, moreover, is essential to "enhanc[ing] competition and advanc[ing] a seamless national

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[84/] Such interconnection is also available to mobile service providers without complete stand-alone networks.

[85/] See, e.g., Conference Report at 490.

[86/] House Report at 260.

network."[87] The adoption of multiple and inconsistent interconnection policies by the states, with the attendant costs and technological disuniformity, would substantially undermine these goals. The Commission should therefore adopt its proposal to preempt state regulation of the right to interconnection and the right to specify the type of interconnection.[88]

Conclusion

For the foregoing reasons, and as described in greater detail above, the Commission should effectuate the Congressional intent to encourage the growth and development of mobile services by adopting rules that impose similar regulatory requirements on

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[87] House Report at 261; see 47 U.S.C. § 332(c)(1)(B).

[88] See Notice at ¶ 71 ("[W]e tentatively conclude that permitting state regulation of the right to interconnect and the type of interconnection for intrastate service would negate the important federal purpose of ensuring interconnection to the interstate network.")

comparable carriers and that remove state regulatory impediments to seamless, nationwide mobile service.

Respectfully submitted,

MCCAW CELLULAR COMMUNICATIONS, INC.

R. Gerard Salemme
Senior Vice President
of Federal Affairs
Cathleen A. Massey
Senior Regulatory Counsel
McCaw Cellular Communications, Inc.
1150 Connecticut Avenue, N.W.,
4th Floor
Washington D.C. 20036
(202) 223-9222

Of Counsel:

Howard J. Symons
Gregory A. Lewis
Kecia Boney
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
Suite 900
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004

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